Supreme Court, U. S.
FILED
OCT 6 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 75-1808

TATIANA DIAZ CALVO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Florida District Court of Appeal, Third District, is reported at 313 So.2d 39 (3d D.C.A. Fla. 1975), and is attached to the petition for writ of certiorari as Appendix 1-3.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTION PRESENTED

The respondent respectfully rephrases the petitioner's "Questions Presented" as follows:

> WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE OPINION BELOW HOLDING THAT THERE WAS NO VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS IN THE SUMMARY DENIAL OF PETITIONER'S MOTION ATTACKING HER GRAND JURY, WHERE THAT MOTION CONTAINED ONLY BARE ALLEGATIONS AND CONCLUSIONS DEVOID OF ANY FACTUAL ALLEGATION OR SUPPORTING PROOF.

STATEMENT OF THE CASE

The respondent accepts the petitioner's Statement of the case as correct, but deems the following additional facts to be relevant to this Court's decision on the question of jurisdiction:

Prior to trial, the petitioner filed a motion attacking the composition of the Grand Jury which had issued her indictment, as well as the selection procedure for the Grand Jury. The petitioner requested an evidentiary hearing on her Grand Jury challenge.

In order to support her motion, petitioner took the depositions of four State and County officials involved in the Grand Jury selection process. At a hearing held prior to trial, the Assistant State Attorney announced that the State was abandoning the Indictment and proceeding under the Information, which had been filed on February 20, 1974. (appendix 17-20). The trial court then denied the petitioner's motions relating to her attack on the 1973 Dade County Spring Term Grand Jury and ruled that prior defense motions filed would carry over to the Information. (appendix A-D). The record is devoid of any indication that the depositions were introduced into evidence or even presented to the trial court.

ARGUMENT

In the amended motion to dismiss her Indictment, the petitioner alleged that the Grand Jury which had indicted her was drawn from an improperly constituted jury pool. As grounds therefore, it was alleged that the Grand Jury Pool purposely discriminated against several classes of people specified as follows:

1. Black persons,
2. Persons with incomes less than $8,000 per year, and low-income persons generally,
3. Women,
4. Blue collar workers,
5. Persons between the ages of 18, 19 and 20,
6. Persons between the ages of 21 and 34,
7. Persons over 60 years of age,
8. Persons with less than a 12th grade education,
9. Persons of Latin American decent,
10. Persons in the southern most part of Dade County and the northern most part of Dade County,
11. Persons from the "inner city" and generally black "ghetto" areas,
12. Persons who have registered to vote in Dade County within the last three months.

No further specific allegations were made as to the basis for the alleged invalidity of these classifications and no underlying facts were alleged.

The petitioner did take the depositions of four State and County officials involved in the Grand Jury selection process, but these depositions were never placed into evidence, and the record does not show if they were shown to the trial judge prior to his denial of the petitioner's motion. The motion was denied at the same hearing where the State Attorney announced that the State was abandoning the Indictment and proceeding under the Information. The Florida District Court of Appeal, Third District, affirmed the trial court purportedly in reliance upon the previous rulings in Seay v. State, 286 So.2d 532 (Fla. 1974), cert. den. 419 U.S. 847; Rojas v. State, 288 So.2d 234 (Fla. 1973), cert. den. 419 U.S. 851; and Dykman v. State, 294 So.2d 633 (Fla. 1973); cert. den. 419 U.S. 1105.

The petitioner claims she was denied constitutional rights to which she was entitled under the holding in Test v. United States, ___U.S.___, 95 S.Ct. 749 (1975). However, the holding in Test v. United States, supra., was that a federal court litigant has an unqualified statutory right to inspect jury lists pursuant to section 1867(f) of the Jury Selection and Service Act, 28 U.S.C. §1861, et. seq. This Court did not hold that the unqualified right to inspect jury lists was a constitutional right, and there is no reason to conclude that this Court meant its decision to be controlling over the states. The law of Florida sets forth a

procedure identical to that held to be constitutional by the federal courts. Before a full scale investigation of the State's jury processes is warranted, it is incumbent on the petitioner to allege some factual basis from which it may be determined that the jury panel can be deemed to be suspect. Rojas v. State, supra.; Dykman v. State, supra.; United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965); Windom v. United States, 260 F.2d 384 (10th Cir. 1958). Cf. United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973).

Under Florida law, grand jury records and proceedings are secret and may only be disclosed for certain limited purposes and under particularized circumstances. Gonzalez v. State, 220 So.2d 393 (Fla. DCA, 1969). Chapter 57-550, Laws of Florida, in Section 6 thereof provides that the names

> "...of each of said persons shall be written upon a separate slip of paper and folded and placed, together with the list itself in a secure metal box to be known as the "Grand Jury Box", which shall be securely locked and sealed and the names of one or more of the Grand Jury Commissioners, together with the date, shall be written across the seal, and the box shall be delivered to the Clerk of the

> Circuit Court, who shall securely keep the same in a safe place, and the key thereto shall be kept by the Grand Jury Commission."

The seal may be broken and the box opened only when the Grand Jury is drawn. Thereafter, the box must be again locked and resealed by the Grand Jury Commissioners. The obvious intent of the above legislation is that the names of those citizens placed upon the Grand Jury Master List and serving upon a particular Grand Jury shall remain a secret until the conclusion of their service. Accordingly, in seeking disclosure of such information provided by State law to be secret, the burden is on the accused to plead and prove, with the greatest accuracy and precision, the irregularities in the selection of the grand jurors which are claimed to have vitiated an indictment. State v. Demetree, 213 So.2d 709, 713 (Fla., 1968).

The petitioner claims she met this burden by taking the depositions of four State and County Officials involved in the Grand Jury selection process. This contention is a State evidentiary question and does not present a federal question of substance. In any case, these depositions were never introduced into evidence, and there is no indication they were even presented to the trial court. Since no evidence of any irregu-

larity in selecting the Grand Jury was presented to the trial court, denial of the petitioner's motion was mandated.

From its opinion, it is unclear if the Florida District Court of Appeal, Third District, considered the depositions. Respondent suggests that the Court did not consider the depositions, that it was bound by the State rule which prohibits the State appellate courts from considering exhibits which were never admitted into evidence or presented to the trial court. See: First National Bank in Fort Lauderdale v. Hunt, 244 So.2d 481 (4th DCA Fla. 1971); Watson v. Williams, 227 So.2d 226 (1st DCA Fla. 1969); Florida Livestock Board v. Hygrade Food Products Corp., 141 So. 2d 6 (1st DCA Fla. 1962).

Even if the depositions could have been considered by the Florida District Court of Appeal, it is still a state evidentiary question as to whether they contained facts sufficient to raise a doubt as to whether the panel may be improperly constituted.

For a petitioner to establish a constitutional violation of the type here attempted, he must first prove that the group allegedly excluded constitutes a distinguishable or cognizable class. In addition to the failure to allege any factual bases for petitioner's contentions as discussed above, there is the additional failure to specify any use of the

selection system by officials so as to intentionally or unintentionally result in an invalid array of jurors. Since federal courts faced with this issue have been reluctant to conclude the presence of constitutional violations in the absence of any allegations that the group excluded constitutes a distinct and separate class, the failure of the instant petitioner to so plead was a most serious omission.

A cognizable class for the purpose of jury challenges has been defined as one which has a definite composition, that is, which contains some factor which defined and limits the group. It is not one whose membership shifts from day to day or whose members can be arbitarily selected. The group must have cohesion as well as some basic similarity in attitudes or ideas or experience which is present in the members of the group and which can not be adequately presented if the group is excluded from the selection process. Thus, there must be a possibility that exclusion of the group will result in partiality or bias on the part of the juries hearing cases in which group members are involved. United States v. Guzman, 337 F. Supp. 140 (S.D.N.Y., 1972); affirmed 468 F.2d 1245 (2d Cir. 1972). Consequently, age as a measure of representation has been disfavored as a criterion for measuring the legality of jury selection. United States v.

v. DiTommasi, 405 F.2d 385 (4th Cir. 1968); United States v. Gooding, 473 F.2d 425 (5th Cir. 1973); State v. Silva, 259 So. 2d 153 (Fla. 1972). Similarly, a one year residence requirement for persons serving on federal, grand, and petit juries was held not to be an unconstitutional requirement in United States v. Perry, 480 F.2d 147 (5th Cir., 1973), where as a result no cognizable group was excluded.

Moreover, petitioner's allegations do not amount to a prima facie showing of systematic exclusion of necessary groups from her Grand Jury. It has been held that in order to make a prima facie showing of systematic exclusion from the grand jury petitioner would have the burden of proving first that the opportunity for discrimination existed by reason of the use of a biased source of potential jurors, and second that the use of such an infected source produced a significant disparity between the percentages in the source and the percentage on the grand jury panel. Wright v. Smith, 474 F.2d 349 F.2d 349 (5th Cir. 1973). Since there need not be proportional representation on the grand jury of each element of the population entitled to serve, Cassell v. Texas, 339 U.S. 282-287 (1950), it is necessary to establish a prima facie case. Alexander v. Louisiana, 405 U.S. 625, 629 (1972); Whitus v. Georgia, 385 U.S. 545, 552 (1967). Alexander requires that there

be an opportunity for discrimination in addition to a showing of steady under-representation of a cognizable class of citizens on the jury panels for an appreciable period of time.

The instant case raises the same issues as were presented to this Court in Seay v. Florida, 419 U.S. 847 (1974); Rojas v. Florida, 419 U.S. 851 (1975); and Dykman v. Florida, 419 U.S. 1105 (1975). In all three cases, this Court denied certiorari. Since the facts and issues are substantially similar, it is respectfully submitted that the instant case presents no better grounds for the issuance of a writ of certiorari. The petitioner's conclusary allegations foreclosed the possibility that the trial judge could ascertain whether there was any legal basis for petitioner's ultimate conclusions. In the absence of any legally sufficient factual allegation upon which petitioner might be able to establish a prima facie showing, the State courts were eminently correct in determining that an evidentiary hearing was not required.

Respondent also submits that no substantial federal question is presented by the fact that Laws of Florida, Chapter 57-550, as amended by Chapter 70-1000, appoints the Dade County Circuit Court Judges to the Dade County Grand Jury Commission. The petitioner claims, that by virtue of this law, the judge who ruled on her motion could not be totally neutral.

The petitioner has made no showing of actual prejudice or bias on the part of the trial judge and has never claimed that the trial judge was anything less than impartial. Petitioner made no motion to have an outside circuit judge, from beyond the circuit, assigned to the case. There is nothing in the record to show that the trial judge actually participated in choosing the members of the Grand Jury that indicted petitioner.

Under both federal and state law, grand juries have historically been considered an appendage of the courts. They not only relate to courts, but are inextricably bound up with them. Brown v. United States, 359 U.S. 41 (1959); United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975); State v. Digman, 294 So.2d 325 (Fla. 1974). The quasi-judicial responsibilities imposed upon judges by Chapter 70-1000, Laws of Florida, in no way create a conflict of interest which would affect their neutrality. As stated by the Florida Supreme Court in Seay v. State, supra.

> We find Ch. 70-1000, Laws of Florida, to be constitutional per se and as applied in this case. The Legislature's determination to designate the circuit judges in larger counties to supply names of prospective grand jurors from which a panel is drawn, meets the requirements of reasonable-

ness, accuracy and fairness. The multiple number of circuit judges in such large circuits is calculated to reflect a fair cross section of the citizens and those who are well qualified to serve in this important assignment in their courts as grand jurors. Such judges are elected at large and are responsive to the electorate; they are knowledgeable with regard to the various sections of the circuit, its citizens and groups within the area which make up the community, by reason of the wide and varied contacts which they have over the circuit. The function of circuit judges in selecting grand jury names for consideration and service is a proper one and is not at odds or divergent to their duties as judges. They are, in fact, particularly suited to the task.

Id at 537.

Lastly, the respondent respectfully submits that the issue herein presented is moot. A criminal Information was filed against the petitioner on February 20, 1974 (appendix 17-20) and prior to trial the State abandoned the Indictment and proceeded under the Information. (appendix

A-D). This the State had a perfect right to do, inasmuch as the Grand Jury and the State Attorney have concurrent authority to file a formal accusation of the commission of a felony not involving capital punishment. State ex rel. Hardy v. Blount, 261 So.2d 172 (Fla. 1972); Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975). In the absence of evidence to the contrary, there is a presumption that public officals act properly in the performance of their duties Purdy v. Mulky, 228 So.2d 132 (3d DCA Fla. 1969); Alderman v. United States, 394 U.S. 165 (1969) and consequently, that the information was based upon the State Attorney's independent determination of probable cause.

Once the State elected to abandon the Indictment and proceed under the Information the petitioner's Grand Jury Challenge became moot. Even if the Indictment was ultimately held to be invalid due to an improperly impaneled Grand Jury this could not affect the validity of the Information, which was filed under the authority of the State Attorney.

The trial court did order that the pretrial motions of the petitioner would carry over to the Information. This included that portion of the petitioner's motion to dismiss which challenged the sufficiency of the Indictment and was not rendered moot when the State abandoned the Indictment. However, those portions of the motion which

challenged the Grand Jury itself were rendered moot and the respondent respectfully submits that this Court should deny certiorari. Henry v. Mississippi, 379 U.S. 443 (1965); North Carolina v. Rice, 404 U.S. 244 (1971).

CONCLUSION

Petitioner's failure to set forth any factual allegations to support her legal conclusions and her failure to place the depositions into evidence, deprived the Florida Third District Court of Appeal of any reasonable basis for concluding the instant Grand Jury was constitutionally suspect. That same deficiency renders insubstantial the federal question here presented. In addition, no case and controversy is presented, since the State's election to abandon the Indictment and proceed under the Information rendered the issue moot. It is respectfully submitted that this Court should deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT IN OPPOSITION was furnished by mail to the HONORABLE JOEL HIRSCHHORN, 1040 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this ____ day of September, 1976.

IRA N. LOEWY
Assistant Attorney General

APPENDIX

APPENDIX A

MR. HIRSCHHORN: Mr. Raffle and I have a jury trial and I am in front of Judge Sepe.

THE COURT: The Court has decided to accept the information as filed; for the record, in connection with Calvo, Tatiana Calvo.

MR. HIRSCHHORN: We are then in this posture; the State has moved the Court to dismiss the indictment. The Court has granted the motion to dismiss the indictment.

MR. RAFFLE: I don't know if you granted that or not. I don't mind if you do.

THE COURT: I haven't granted that. I don't know if I have the jurisdiction to grant while it's on appeal.

MR. HIRSCHHORN: Nothing in this case is on appeal.

MR. RAFFLE: The question in some of the other cases--

THE COURT: This particular case is on appeal.

MR. RAFFLE: Judge Rowe deferred ruling. Most of those are first degree cases. This is a second degree. All we need is a trial date and then dismiss all of the indictments. I think that would make it.

APPENDIX B

THE COURT: And a plea by Mr. Hirschhorn as to this particular--

MR. HIRSCHHORN: I would like the order to be submitted. The State is doing what with the indictment? Abandoning it?

MR. RAFFLE: I am moving the Court to dismiss the indictment.

MR. HIRSCHHORN: The State has no jurisdiction to dismiss, move to dismiss the indictment. If it wanted to dismiss, the foreman of the Grand Jury ought to endorse a motion if, in fact, the State has authority and we say, under the rules, they have no authority.

MR. RAFFLE: In that thought I will abandon it and proceed under the information.

THE COURT: All right.

MR. HIRSCHHORN: And my answer to that, so the record is clear, the State cannot abandon something that is done by the Grand Jury. Only the Grand Jury can abandon it. The State Attorney's Office is merely--

THE COURT: Would you enter a plea then?

MR. HIRSCHHORN: The Defendant would decline to plea the information on the following grounds: First, we have the right to decline. We asked the Court to enter a plea and asked the Court to permit me to make as part of this record the five-page transcript of what occurred in this Court

on January 7, 1974, wherein the Calvo case came on for trial on the trial calendar on the indictment. At that time I reminded Judge Rowe, in the presence of Mr. Raffle, we were attacking the Grand Jury that returned the indictment.

I pointed out this was a six-month speedy trial and it's not Mr. Raffle's fault. The State took approximately three and a half months from the time of arrest and filing the indictment, and we have not delayed this at all. If it is necessary to get the Grand Jury I will waive speedies in this case.

The speedy trial does not expire until February 12th, February 8th.

*****

THE COURT: All right. We will load up May 6th.

This is a second degree murder?

MR. HIRSCHHORN: Yes, your Honor.

THE COURT: Abandon the indictment? Enter a plea inasmuch as the Defendant stands moot, enter not guilty, trial by jury and set trial for May 6th.

MR. HIRSCHHORN: Monday, May 6th.

THE COURT: That will go that Monday, commencing that Monday with a jury selection at 11:00 o'clock.

MR. HIRSCHHORN: Okay.

THE COURT: That is a definite date.

MR. HIRSCHHORN: One last thing. I assume all motions will carry over. If I need additional time, may I have additional time to file additional motions, if I decide to file any?

MR. RAFFLE: I don't object to any motions that have been filed carrying over to the information.

(R. 7-13).